Bank Utama (M) Bhd v Yap Chee Wah & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S2–(S5)–24–763 OF 1999
KAMALANATHAN RATNAM J
23 APRIL 2001

Contract *— Breach — Notice of demand — Loan agreement — Default — Service of notice — Whether notice given to both defendants — Whether sufficient time given to defendants to remedy the breach*

The defendants entered into a sale and purchase agreement with Sunrise Sdn Bhd for the purchase of two pieces of property. The defendants then entered into a loan agreement cum deed of assignment with the plaintiff to finance the purchase of the property. When the defendants defaulted, the plaintiff sent an AR registered notice of demand dated 26 February 1998 addressed to the first defendant demanding the full balance due. The defendants contended that there was no proper notice as it was also not sent to the wife (the second defendant). It was not disputed that two other further notice (dated 23 March 1998 and 13 May 1999) were also given to the defendants. The defendants argued that the relevant notice dated 13 May 1999 did not give the defendants the required seven days to remedy the breach and therefore the notice was bad in law.

Held:

The earlier notice dated 26 February 1998 was only to assist the defendants by jolting them to settle the outstanding instalments due. The court was satisfied that a proper notice was indeed given by way of the letter of demand dated 23 March 1998 and properly addressed to both the defendants (see pp 6I–7A). On the remedial issue, the plaintiff had given sufficient time for the defendants to comply. The second notice dated 23 March 1998 clearly gave the defendants the required seven day's notice to remedy the breach. There was absolutely no need for the plaintiff to have given the third notice as the second notice sufficed (see p 8A–B).

[Bahasa Malaysia summary

Defendan-defendan telah memasuki satu perjanjian jual beli dengan Sunrise Sdn Bhd untuk membeli dua keping hartanah. Defendan-defendan kemudiannya telah memasuki satu perjanjian pinjaman yang juga suratikatan penyerahhakan dengan plaintif untuk memberikan kemudahan kewangan membeli hartanah tersebut. Apabila defendan-defendan mengingkari, plaintif telah menghantar satu notis tuntutan AR berdaftar bertarikh 26 Februari 1998 yang dialamatkan kepada defendan pertama menuntut baki penuh yang

perlu dibayar. Defendan-defendan menegaskan bahawa tiada notis yang betul kerana ia juga tidak dihantar kepada isterinya (defendan kedua). Adalah tidak dipertikaikan bahawa dua notis selanjutnya (bertarikh 23 Mac 1998 dan 13 Mei 1999) juga telah diberikan kepada defendan-defendan. Defendan-defendan menghujahkan bahawa notis yang berkaitan bertarikh 13 Mei 1999 tidak memberikan defendan-defendan tujuh hari yang diperlukan untuk meremedikan pelanggaran tersebut dan oleh itu notis tersebut adalah salah dari segi undang-undang.

Diputuskan:

Notis sebelum ini bertarikh 26 Februari 1998 adalah hanya untuk membantu defendan-defendan dengan mengejutkan mereka untuk menyelesaikan baki ansuran yang perlu dibayar. Mahkamah berpuas hati bahawa satu notis yang betul telahpun diberikan melalui sepucuk surat tuntutan bertarikh 23 Mac 1998 dan dialamatkan dengan betul kepada kedua-dua defendan (lihat ms 6I–7A). Berhubung isu remedi, plaintif telah memberikan masa yang mencukupi untuk defendan-defendan mematuhinya. Notis kedua bertarikh 23 Mac 1998 dengan nyata memberikan defendan-defendan notis tujuh hari yang diperlukan untuk meremedikan pelanggaran tersebut. Plaintif tidak langsung perlu memberikan notis ketiga kerana notis kedua adalah mencukupi (lihat ms 8A–B).]

Notes

For cases on breach of contract generally, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1946–2088.

Edwin Koh (*Raja, Darryl & Loh*) for the plaintiff.
YH Wong (*SL Tan & Associates*) for the defendants.

Kamalanathan Ratnam J:

Facts

The defendants entered into a sale and purchase agreement with Sunrise Sdn Bhd ('developer') for the purchase of two pieces of property ('the property'). To enable the plaintiff herein to grant the defendants for the purpose of purchasing the said property, an overdraft facility for RM150,000 and a housing loan of RM170,000 ('the said facilities'), the defendants entered into a loan agreement cum deed of assignment with the plaintiff ('loan/assignment agreement'). When the defendants defaulted the plaintiff sent an AR registered notice of demand dated 26 February 1998 demanding the full balance due. As of the date of the hearing the total sum due and owing as pleaded amounted to RM464,932.16.

The claim

The plaintiff prayed for the following orders:

(1) deklarasi bahawa plaintif adalah tuanpunya mutlak harta yang dikenali sebagai Parsel No E22-B, Storey No 22, Bangunan No B, Everett Tower, Mont Kiara Pines berserta dengan parsel sampingan yang dikenali sebagai Parsel No 114 Bangunan E dengan alamat posnya dikenali sebagai 15 B-22-2, Everett Tower, Mont Kiara Pines, Jalan 1/70C, Off Jalan Bukit Kiara, 50480 Kuala Lumpur bebas daripada apa-apa bebanan dan halangan menurut peruntukan Perjanjian Pinjaman dan Perjanjian Penyerahanhak bertarikh 16 Januari 1996 yang dibuat antara plaintif di satu pihak dan defendan-defendan di pihak sebelah ('Perjanjian dan Penyerahanhak tersebut');

(2) deklarasi menurut (1) di atas bahawa plaintif berhak menjual dan menyerahhak harta tersebut pada sesuatu tahap harga dan mengikut apa-apa cara melalui lelong awam atau secara triti persendirian bebas daripada apa-apa kepentingan defendan-defendan dan menggunakan hasil jualan untuk penyelesaian jumlah wang yang kena dibayar kepada plaintif di bawah Perjanjian dan Penyerahanhak tersebut hingga pada tarikh perintah dan bunga ke atas jumlah wang yang kena dibayar kemudian daripada itu hingga ke tarikh pembayaran sepenuhnya pada kadar sebagaimana yang ditetapkan oleh plaintif;

(3) satu perintah bahawa defendan-defendan hendaklah dengan serta merta menyerah milikan kosong harta tersebut kepada plaintif atau penerima namaannya;

(4) Satu perintah bahawa plaintif diberi kebebasan untuk memohon apa-apa arahan selanjutnya berkenaan dengan penjualan tersebut daripada Mahkamah;

(5) satu perintah bahawa kos yang ditanggung dalam permohonan dan penjualan ini dibayar daripada hasil jualan tersebut; dan

(6) apa-apa perintah selanjutnya sebagaimana yang difikirkan patut oleh mahkamah.

Findings of the court

Notice of demand

On 26 February 1998, the plaintiff sent a notice of demand addressed only to the first defendant. It is not denied that the first defendant is the husband of the second defendant. The defendants contended that since this notice was also not sent to the wife, the second defendant, there was no proper notice and that on this ground alone the plaintiff's action must fail. It is important to set out the full text of the said notice. It reads as follows:

Our ref: SLY 95/78

NOTICE OF DEMAND

Yap Chee Wah 26 February 1998
15B-22-2, Everett Tower
Mont Kiara, Jalan 1/70 C
50480 Kuala Lumpur Ordinary Mail/AR Registered

Dear Sir/Madam,

Housing Loan of RM170,000
Overdraft of RM150,000
Instalment and Interest in arrears
Account No: 40280000742 & 10280000075

We wish to draw to your attention that as of date, we have not received your payment to settle the following amount which is already overdue:

Term Loan	*Month*	*Amount*
Instalment for:	December 1997	RM1,574.00
	January 1998	RM1,574.00
	February 1998	RM1,574.00
	Penalty Interest	RM 55.00
		RM4,777.00
Overdraft		RM3,564.32
	Total	RM8,341.32

You are hereby given fourteen (14) days from the date hereof to settle the sum overdue amounting to RM8,341-32 failing which we shall recall your housing loan and overdraft facilities without further reference to you and resort to legal proceedings against you. All legal expenses incurred shall be borne by you.

We request your urgent co-operation and look forward to your immediate settlement of the above.

Thank you.

Yours faithfully,
for BANK UTAMA (MALAYSIA) BHD
Selayang Branch

Sgd
(Ch'ng Seong Wah)
Customer Relationship Manager

It is clear from the said notice that what the plaintiff was doing was to give the defendants an opportunity to update the instalments due, failing which it would exercise its right to recall the facilities granted. However, since the defendants failed to comply, the plaintiff then sent a full and proper notice dated 23 March 1998 demanding the outstanding sums due on both the facilities, and this notice was addressed to both the defendants. The said notice is reproduced in full and reads as follows:

114.430751 AR REGISTERED, REGISTERED & ORDINARY POST

Yap Chee Wah &
Foo Kim Lean
15 B-22-2
Everett Tower, Mont Kiara Pines
Jalan 1/70C, Off Jalan Bukit Kiara
50480 Kuala Lumpur

23 March 1998

Dear Sirs,

Re: BANK UTAMA (M) BHD
Housing Loan of RM170,000
Overdraft Facility of RM150,000

We act for Bank Utama (Malaysia) Bhd of inter alia, 77 & 79, Jalan 2/3A, Pasar Borong, Jalan Ipoh, 68100 Kuala Lumpur who has granted you the following banking facilities:

1.1 a housing loan of RM170,000; and
1.2 an overdraft facility of RM150,000.

2 Our client informs us that presently there are sums due and owing under the said banking facilities and that you are in default in respect of your repayments thereunder and/or that your conduct of the said banking facilities is unsatisfactory.

3 Our client now wishes to recall the said banking facilities. On our client's instructions we hereby demand from you the following:

3.1 Under the housing loan of RM170,000

The sum of RM175,210.60 which is due and owing as at 19 March 1998 and interest thereon chargeable at the rate of 1.5%pa above our client's base lending rate on monthly rests calculated from 20 March 1998 until the date of full settlement; and

3.2 Under the overdraft facility of RM150,000

The sum of RM155,064.40 which is due and owing as at 19 March 1998 and interest thereon chargeable at the rate of 2.75%pa above our client's base lending rate on daily rests calculated from 20 March 1998 until the date of full settlement. Take note that currently our client's base lending rate stands at 12%pa.

4 TAKE NOTICE that should we fail to receive the aforesaid sums together with all interest charges accruing thereon as aforementioned and a further sum of RM85 being our solicitors' costs herein incurred within seven (7) days from the date hereof, we have firm instructions to proceed with legal action against you without further reference to you. In that event you shall be further liable for all additional costs and expenses incurred.

Yours faithfully,

Sgd
cc Client (By Fax/Post)
(Ref SLY 95/78)

Even then the plaintiff gave the defendants more time until finally it sent another notice dated 13 May 1999 addressed to both the defendants. The said notice is also reproduced in full and reads as follows:

cwm 430751 lsm lps

AR REGISTERED & ORDINARY POST

Yap Chee Wah &
Foo Kim Lean
15 B-22-2
Everett Tower, Mont Kiara Pines
Jalan 1/70C, Off Jalan Bukit Kiara
50480 Kuala Lumpur

13 May 1999

Dear Sirs,

Re: BANK UTAMA (M) BHD
Housing Loan of RM170,000
Overdraft Facility of RM150,000

We act for Bank Utama (Malaysia) Bhd of, inter alia, 77 & 79, Jalan 2/3A, Pasar Borong, Jalan Ipoh, 68100 Kuala Lumpur who has granted you the following banking facilities:

1.1 a housing loan of RM170,000; and

1.2 an overdraft facility of RM150,000.

2 Our client informs us that presently there are sums due and owing under the said banking facilities and that you are in default in respect of your repayments thereunder and that your conduct of the said banking facilities is unsatisfactory. Further, you have failed to comply with the demand in our letter dated 23 March 1998.

3 We have been instructed that the above banking facilities are secured, inter alia, by a loan agreement cum assignment dated 16 January 1996 ('the said Assignment') over the property known as a Parcel No E22-B, Storey No 22, Building No B, Everett Tower, Mont Kiara Pines together with an accessory parcel distinguished as Parcel No 114 of Building No E bearing a postal address at 15 B-22-2, Everett Tower, Mont Kiara Pines, Jalan 1/70C, Off Jalan Bukit Kiara, 50480 Kuala Lumpur ('the said property').

4 Our client hereby terminates your licence to occupy the said property and demands that you surrender vacant possession of the said property to our client within seven days hereof.

5 Take note that we have our client's instructions to proceed with legal action against you to exercise all their rights against you as provided by law.

Yours faithfully,

Sgd
cc Client
- Selayang Branch
- Regional Office

To my mind, the earlier notice was only to assist the defendants by jolting them to settle the outstanding instalments due. That is why it was only addressed to the husband. I am satisfied that a proper notice was indeed

given by way of the letter of demand dated 23 March 1998 and properly addressed to both the defendants. The third notice dated 13 May 1999 was superfluous.

Notice to remedy the breach

The defendants referred me to cl 11.01 of the loan/assignment agreement. The said clause is reproduced herewith:

> SECTION 11.01 Rights of Bank on Borrower's Default
> If the borrower shall commit a default pursuant to s 10.01 or if any of the events stipulated in s 10.01 hereof shall happen and which if capable of remedy is not remedied within a period of seven (7) days from the date of notice by the bank requesting remedy of the same, or is not remedied within the time specifically stipulated therefor (if any) in respect of the event in question, all advances, the facility, interest thereon and all other sums payable under this Agreement shall become and be deemed to be, notwithstanding anything contained herein to the contrary, forthwith due and payable and whereupon the bank shall be entitled without further notice to the borrower:
>
> (a) to institute legal proceedings against the borrower for the full recovery of all the monies payable by the borrower to the bank hereunder;
>
> (b) to terminate the licence hereinbefore referred to and to enter upon and take possession of the property or any part thereof and to deal with all the rights and interest of the bank in relation to the property or otherwise in all respect as the person absolutely and beneficially entitled thereto;
>
> (c) to let or lease the property or any part thereof for such tenancy or term of years at such rent and upon such terms and conditions as the bank shall in its absolute discretion think fit;
>
> (d) to sell, transfer or assign the property or any part thereof as the beneficial owner thereof at such price and in such manner and subject to such conditions as the bank shall in its absolute discretion think fit free from any interest of the borrower hereunder or otherwise and no assignee or purchaser of the bank shall be required or concerned to see whether any such default has in fact been made by the borrower or any other occasion has arisen for the exercise of the bank's rights and power of assignment or of the sale hereunder.
>
> The borrower hereby expressly agrees, covenants and undertakes to do and execute all acts, deeds, instruments and things which the bank may require or stipulate for the purposes of effecting and or completing anything and/or any transaction mentioned in this section. And the borrower hereby further agrees that in the event of the bank taking possession of and/or exercising its rights to the property under s 11.01(b) and (c) hereof, the bank shall not be liable to the borrower for any act whereby the capital value of the property is impaired or the borrower is otherwise put to any loss nor be accountable to the borrower for the sums or monies received by the bank (by way of occupation or receipt of rent) except for the sums or monies remaining after deduction of the facility, interest, charges and all sums of monies covenanted to be paid by the borrower to the bank and secured hereunder.

It was the case of the defendants that the relevant notice dated 13 May 1999 did not give the defendants the required seven days to remedy the breach and therefore the said notice was bad in law. On the remedial issue, I am satisfied that the plaintiff had given sufficient time for the defendants to comply. In fact, the second notice dated 23 March 1998 clearly gave the defendants the required seven day's notice to remedy the breach. It is my judgment that there was absolutely no need for the plaintiff to have indeed given the third notice as the second notice sufficed.

I therefore granted the plaintiff an order in terms of prayers (1)–(5) only.

Order accordingly.

Reported by Benjamin Yong